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No. _____

Supreme Court, U.S.
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In The

# Supreme Court of the United States

REGINALD HILL,

*Petitioner,*

v.

THE UNITED STATES OF AMERICA,
KATHLEEN ARCHER, and MARILU MACHIN,

*Respondents.*

**On Petition For Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Eleventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

(1) Whether the Civil Service Reform Act precludes a constitutional right to privacy and whether that constitutional right to privacy is considered a Prohibited Personnel Practice under the Civil Service Reform Act?

(2) Whether defense counsel unlawfully obstructed or concealed Petitioner's access to Respondent's Statement of Undisputed Facts, in Support of his Motion for Summary Judgment?

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner, Reginald Hill, respectfully requests that a writ of certiorari issue to review the judgment of the United States District Court, Southern District of Florida in this case and that the judgment of the District Court be vacated.

## OPINIONS OF THE LOWER COURTS

It is not known whether the opinions of the lower courts in this case have been published. The unknown published reports appear at Appendix A-D.

## JURISDICTION

The United States Court of Appeals entered their decision for rehearing on December 19, 2008. The judgment was entered October 23, 2008 and the Mandate was entered on December 29, 2008. This Court possesses jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not

> be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend IV.

> The Florida Constitution provides:
>
> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communication by any means, shall not be violated . . . This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. . . .

Fla. Const. Art. 1, Section 12.

> Section 456.057 (5)(a) states in pertinent part:
>
> [S]uch records may not be furnished to, and the medical condition of a patient may not be discussed with, any person other than the patient or the patient's legal representative or other health care practitioners or providers involved in the care or treatment of the patient, except upon written authorization of the patient.

Fla. Stat. 456.057 (5)(a).

Section 395.3025 (4)(4)(d), states in pertinent part:

> Appellant records are confidential and must not be disclose without the consent of the person to whom they pertain, but appropriate disclosure may be made without such consent to: . . . (d) In any civil or criminal action, unless otherwise prohibited by law, **upon the issuance of a subpoena from a court of competent jurisdiction and proper notice by the party seeking such records to the patient or his or her legal representative.**

Fla. Stat. 395.3025 (4)(4)(d).

The General Obstruction Statute, Section 1503, proscribes the intentional interference with the administration of justice:

> (a) Whoever . . . corruptly, or by threats or force or by threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b).

Gen. Obstruct. Stat. § 1503.

## STATEMENT OF THE CASE

On August 25, 2003, Petitioner was promoted to Courtroom Deputy for U.S. District Judge Donald M. Middlebrooks. Shortly afterwards, Petitioner was

sent to Miami in September 2003, for training and Petitioner successfully completed the training without any discrepancies. Around late September early October 2003, Petitioner was instructed to attend training in Ft. Lauderdale. Petitioner was successful in acquiring the knowledge presented during training but experienced constant interference during training. On October 9, 2003, Petitioner received a call from Vanessa Powell-Bacourt, Court Services Manager requesting that Petitioner (trainee) fill in for Valerie Thompkins (Trainer) on October 10, 2003. Valerie Thompkins had planned a shopping trip to New York and Petitioner agreed to cover in her absence to assist U.S. District Judge Cohn. Judge Cohn was very pleased with the coverage provided. Petitioner continued training with Valerie Thompkins until he filed a complaint with the Court Administrator's Office concerning intolerable/inconsistencies in his training environment. That complaint was given to Chief Deputy Steven Larimore who advised Valerie Thompkins (trainer) about the complaint and the behavior escalated until the Petitioner removed himself from the area and notified Michael Beck, Northern Divisional Chief Deputy. Several days later, on October 24 2003, Petitioner courtroom deputy position was advertised without due process; Petitioner was called at home on Saturday, October 26, 2003 and ordered to report to Miami, where he was placed on administrative leave with pay pending an Investigation. Petitioner was never informed of the charges/allegations until November 7, 2003. Chief Deputy Larimore called home to get my fax number

to my fax Petitioner a Notice of Proposed Actions in violation of the District policy that requires the notice to be sent certified mail. I responded to the petition in writing and Petitioner was placed on leave without pay indefinitely. Petitioner is service connected veteran who began experiencing problems with his service connected disability and requested Family Medical Leave under FMLA through the Human Resources Manager, Kathy Archer with no response. On May 6, 2004, Petitioner submitted a certified copy for his eyes only to U.S. District Chief Judge William Zloch. Chief Judge Zloch reviewed the medical records; returned them back to me and told me not to correspond to his office again. On May 11, 2004, Petitioner made a second request for FMLA and on May 14, 2004, Petitioner received a blank certification of healthcare provider form with a letter from Kathleen Archer.

On May 24, 2004, Respondent Dr. Marilu Machin was authorized to complete, sign and release Petitioner's medical certification form to Petitioner. No other person was authorized that information other than Petitioner. Petitioner complied with the procedure under Family Medical Leave Act and the certification form was returned to Respondent Kathleen Archer, Human Resource Manager on May 26, 2004. On May 28, 2004, Respondent Kathleen Archer called and sent a questionnaire on U.S. District Court letterhead requesting clarification from Petitioner's Primary Care Physician, Respondent Dr. Marilu Machin in violation of the Family Medical

Leave Act and without Petitioner's written consent/ authorization. Respondent Marilu Machin completed the questionnaire without reviewing Petitioner's medical record and without written consent from Petitioner authorizing that disclosure; Respondent Machin released inaccurate information concerning Petitioner's health to Kathleen Archer who received that information without Petitioner's written consent. Respondent Archer took that information and used it against Petitioner to exacerbate Petitioner's condition, threaten his employment and made unconscionable request in violation of the Family Medical Leave Act.

## REASON FOR GRANTING THE PETITION

The decision of the United States District Court is in conflict with the United States Court of Appeals in ***Bonner v. City of Pritchard, Alabama***, 661 F.2d 1206, 1210-11 (11th Cir. Nov. 3, 1981) (adopting Fifth Circuit cases up to Sept. 30, 1981 as precedent). See ***Fadjo v. Coon***, 633 F.2d 1172 (5th Cir. Jan. 9, 1981) and ***James v. City of Douglas***, 941 F.2d 1539 (11th Cir. 1981).

1. It is a question of exceptional importance whether an invasion of one's privacy under the CSRA is considered a prohibited personnel practice under 5 U.S.C. 2302 and whether the Civil Service Reform Act bars a Fourth Amendment claim under ***Bivens*** for recognizing a federal right to privacy in medical records. See ***Whalen v. Roe***, 429 U.S. 589, 598 n.23

(1977) (recognizing a federal right of privacy in medical records). On Summary Judgment, Petitioner opposed the motion on the grounds that (1) There are genuine questions of fact remaining (2) Petitioner's claims are not precluded by the Civil Service Reform Act (CSRA) (3) Qualified Immunity should not be granted. Petitioner enjoyed a possessory interest in his medical information and a constitutional protected reasonable expectation of privacy. See ***O'Connor v. Ortega***, 480 U.S. 709 (1987) confirmed that government employees enjoy a reasonable expectation of privacy in personal documents kept at the workplace. ***Webster v. Doe***, 486 U.S. 592, 603, 108 S.Ct. 2047 100 L.Ed.2d 632 (1988).

In ***Webster***, the Supreme Court held that a party must demonstrate a "heightened showing" that Congress intended to eliminate judicial review when a federal statute is construed to deny any judicial forum for a colorable constitutional claim. See ***Fadjo v. Coon***, 633 F.2d 1172 (5th Cir. 1981).

Federal and state laws expressly recognize the privacy interest of citizens in their own medical records. Under federal law, the "need for security in [Fourth Amendment] 'papers and effects' underscores the importance of protecting information about the person, contained in sources such as. . . . medical records." 65 Fed. Reg. 82464 (the privacy Rule under the Health Insurance Portability and Accountability Act). The federal courts of appeals uniformly protect medical record privacy. "This court has interpreted [***Whalen v. Roe***] to confer a right to protect from

disclosure confidential or sensitive information held by the government." ***Sherman v. United States Dep't of the Army***, 244 F.3d 357, 361 n.5 (5th Cir. 2001) (citing ***Fadjo v. Coon***, 633 F.2d 1172, 1175 (5th Cir. 1981)). Other Circuits have held likewise. See ***Anderson v. Romero***, 72 F.3d 518, 522 (7th Cir. 1995) (Posner, J.) (reaffirming a "constitutional right to conceal one's medical history"); ***Doe v. City of New York***, 15 F.3d 264, 267 (2d Cir. 1994); ***United States v. Westinghouse Elec. Corp.***, 638 F.2d 570, 578 (3rd Cir. 1980); see also ***Ferm v. United States Trustee (In re Crawford)***, 194 F.3d 954, 958-59 (9th Cir. 1999), cert. denied, 528 U.S. 1189 (2000); ***Flanagan v. Munger***, 890 F.2d 1557, 1570-71 (10th Cir. 1989); cf. ***Kallstrom v. City of Columbus***, 136 F.3d 1055, 1063 (6th Cir. 1998) (denying enforceability to a waiver of this right). Florida law clearly protects medical record privacy also. A "patient's medical records enjoy a confidential status by virtue of the right to privacy contained in the Florida Constitution, and any attempt on the part of the government to obtain such records must first meet constitutional muster."

***State v. Johnson***, 814 So.2d 390, 393 (Fla. 2002). The requisite showing is lacking consent from the Petitioner because no authority was given to anyone. Florida law expressly protects patients against the type of intrusive search at issue here. Section 395.3025 (4)(4)(d), Fla. Stat.

> Appellant records are confidential and must not be disclose without the consent of the

> person to whom they pertain, but appropriate disclosure may be made without such consent to: . . . (d) In any civil or criminal action, unless otherwise prohibited by law, **upon the issuance of a subpoena from a court of competent jurisdiction and proper notice by the party seeking such records to the patient or his or her legal representative**.

The intrusive search by Archer bypassed this mandated protection for the Petitioner, in violation of his rights. The Supreme Court of Florida has emphasized that the Florida statutory framework "creates a broad and express privilege of confidentiality as to medical records and medical condition of a patient," preventing disclosure of a patient medical information except in very narrow circumstances. ***Acosta v. Richter***, 671 So.2d 149, 150 (Fla. 1996) (citing section 456.057 (5)(a), Fla. Stat. The ***Fadjo*** precedent is particularly illustrative. ***Fadjo*** was decided on appeal from the Southern District of Florida by the old Fifth Circuit on Jan. 9, 1981, and is controlling precedent. See ***Bonner v. City of Pritchard, Alabama***, 661 F.2d 1206, 1210-11 (11th Cir. Nov. 3, 1981) (adopting Fifth Circuit cases up to Sept. 30, 1981 as precedent). The Petitioner, like all patients, has a constitutional right of privacy in those records, and unfettered access by the government would infringe on that right. See ***James v. City of Douglas***, 941 F.2d 1539 (11th Cir. 1991). In ***James***, the plaintiff brought a civil rights action against the city and police officers alleging

that the officers violated a confidentiality agreement by allowing others to view a tape showing the plaintiff and another engaged in sexual activity, 941 F.2d at 1540-51. The Eleventh Circuit held that the plaintiff alleged a violation of a clearly established constitutional right, and thus, the officers were not entitled to qualified immunity. See ***Soto v. City of Concord***, 162 F.R.D. 603, 618 (N.D. Cal. 1995) ("The Supreme Court has recognized a limited privacy interest in the confidentiality of one's medical records derived implicitly from the United States Constitution.").

The Florida Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communication by any means, shall not be violated . . . This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. . . .

Fla. Const. Art. 1, Section 12.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the

> place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

The panel decision conflicts with ***O'Connor***, ***Webster***, and ***Fadjo***.

2. It is a question of exceptional importance when Defense counsel is allowed to unlawfully obstruct Petitioner's access to the Respondents' Statement of Undisputed Facts in Support of his Motion for Summary Judgment. The Respondent concealed this document in violation of the Ethical Rules Governing Spoliation. See Rule 3.4(a) ABA Model Rules, prohibits a lawyer from engaging in spoliation; see the Sarbanes-Oxley Act, Pub. L. No. 107-204 (July 30, 2002) to provide for increased criminal penalties for the spoliation of evidence, and to make clear that willful document destruction is sanctionable. The general obstruction statute, Section 1503, proscribes the intentional interference with the administration of justice (a) Whoever . . . corruptly, or by threats or force or by threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). The panel decision did not address the issue of spoliation and conflicts with ***Chambers v. NASCO***, 501 U.S. 32, 43-45 (1991), through the use of sanctions in order "to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth." ***Gratton v.***

***Great Am. Communications***, 178 F.3d 1373, 1374-75 (11th Cir. 1999) (per curiam) (upholding dismissal of Title VII lawsuit where plaintiff lost or destroyed tape recordings and also refused to release his medical records). The Court never addressed the coaching of witnesses issue which is a violation of Rule 30(d)(1), Fed. R. Civ. P. This sentence was added in 1993. Sanctions, including cost and attorney's fees, pursuant to Rule 30(d)(3)-(4), Fed. R. Civ. P. can be imposed for improper conduct of a deposition. The underlying purpose of a deposition is to find out what a witness saw, heard, or did – what the witness thinks. A deposition is meant to be a question-and-answer conversation between the deposing individual and the witness. There is no proper need for the witness's own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers. See depositions of Carol Farer, Ebony Brown and Marilu Machin.

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 08-11660
Non-Argument Calendar

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D.C. Docket No. 07-80714-CV-PCH

REGINALD HILL,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
KATHLEEN ARCHER,
MARILU MACHIN,
DEPARTMENT OF VETERANS AFFAIRS,
ADMINISTRATIVE OFFICE OF THE COURTS,
General Counsel,
CHALENE SZABO, Medical Center Director,
Department of Veteran Affairs,

Defendants-Appellees.

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Appeal from the United States District Court
for the Southern District of Florida

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(Filed Oct. 23, 2008)

Before ANDERSON, BARKETT and HULL, Circuit Judges.

PER CURIAM:

Reginald Hill appeals the district court's dismissal of his claims against the United States, finding that they were barred by the statute of limitations. He also appeals an adverse summary judgment in favor of Kathleen Archer and Marilu Machin on Hill's claims against these defendants. We affirm.

A suit against the federal government is barred "unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of the final denial of the claim by the agency to which it was presented." 28 U.S.C. § 2401(b). However, statutes of limitation are generally subject to equitable tolling. *Cook v. Deltona Corp.*, 753 F.2d 1552, 1562 (11th Cir. 1985). Here, the district court did not clearly err by finding that the final denial of claim letter was mailed on February 7, 2007 and that there was no basis for equitable tolling. Therefore, the district court did not err by dismissing Hill's claims against the United States as time-barred.

We also conclude that the district court did not err in finding that Hill's constitutional claims against Kathleen Archer and Marilu Machin were barred by the Civil Service Reform Act ("CSRA"). *See Bush v. Lucas*, 462 U.S. 367, 388-90, 103 S.Ct. 2404, 2416-17, 76 L.Ed.2d 648 (1983) (holding that the CSRA precluded an action brought pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971));

*Stephens v. Dep't of Health and Human Services*, 901 F.2d 1571, 1576-78 (11th Cir. 1990) (noting the CSRA is an adequate remedy and precludes all *Bivens* actions for personnel actions that allegedly violate the Constitution). Moreover, the district court did not err in granting Archer and Machin's motion for summary judgment on the basis of qualified immunity because there was no constitutional violation here.

Upon review of the record and upon consideration of the parties' briefs, we find no reversible error.

**AFFIRMED**

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**
**MIAMI DIVISION**
**CASE NO.: 07-CV-80714**

REGINALD HILL,

Plaintiff,

v.

UNITED STATES OF AMERICA, Kathleen Archer, and Marilu Machin,

Defendants. /

## ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

(Filed Mar. 11, 2008)

THIS CAUSE is before the Court on the Defendants, United States of America, Kathleen Archer ("Archer"), and Marilu Machin's ("Machin") Motion for Summary Judgment (D.E. #80) ("Motion"). The Court has reviewed the Motion, with supporting memorandum, exhibits and Statement of Undisputed Facts,[1] the Plaintiff, Reginald Hill's Response in Opposition with exhibits, the Defendants' Reply Memorandum, and pertinent portions of the record.

[1] The Plaintiff, Reginald Hill, has not filed a concise statement of the material facts as to which he contends there exist a genuine issue to be tried as required by this Court's Local Rule, Rule 7.5.B. Nor has Hill challenged Defendant's Statement of Undisputed Facts.

For the reasons discussed below, the Motion is granted as to all Defendants.

## BACKGROUND

As Hill alleges in his complaint, "[t]his case arises from an illegal access and release of Plaintiff Reginald Hill's Medical information by Mrs. Kathy Archer, Human Resource Manger, United States District Court in Miami, Florida and Mrs. Marilu Machin, Physician, Department of Veterans Affairs, in West Palm Beach, Florida." Compl. Para. 1, 45. In summary, Hill alleges claims against Archer and Machin individually for illegal search and seizure, invasion of privacy, and violation of due process protections; and against Defendant, the United States, pursuant to the Federal Tort Claims Act ("FTCA"). Plaintiff alleges that his FTCA claim arises as a result of the "actions of Kathleen Archer and Marilu Machin, acting within the scope of their employment," in the form of "negligence, intentional infliction of emotional distress, and invasion of privacy under the laws of the State of Florida." Compl. Para. 46.

There appears to be no material question of fact. Hill and the Defendants seem to be in agreement as to the determinative facts, but disagree as to the interpretation and legal implication of those facts.

Plaintiff was an employee of the United States District Courts ("U.S. Courts"). Hill applied to the Courts for leave under the Family Medical Leave Act

("FMLA"). As set forth in her May 14, 2004 letter to Hill, Archer, as the appropriate representative of the U.S. Courts, advised Hill that:

> In order to make a determination regarding your request, Medical documentation must be provided within 15 calendar days of today's date. The form "Certification of Health Care Provider (Family and Medical Leave Act 1993)" is to be used for this purpose ... and is enclosed for your convenience. This form must be completed legibly by your health care provider.

As required to support his application, Hill signed a Certification of Health Care Providers Form ("Certification") wherein he authorized his Veterans Affairs ("VA") physician, Machin, to release his pertinent medical information to the U.S. Courts. In response, Machin completed the Certification, indicating Hill suffered a serious health condition but that he could still work intermittently. Hill submitted the completed Certification to Archer for consideration in support of his leave request.

After reviewing the information contained in the Certification, Archer followed up with a letter to Machin, seeking clarification of the information provided in the Certification. The letter asked four specific questions relating to information contained in the Certification. Machin clarified the information

and returned the letter to Archer.[2] The only information the U.S. Courts requested and the only information released to the U.S. Courts was the information contained in the Certification, and the clarification letter, which medical information was in support of Hill's FMLA application. In addition to relying on Hill's Certification, Machin also obtained from Hill his executed Request For and Authorization To Release Medical Records on Health Information, a VA form used to obtain a VA patient's consent to release medical information.

## LEGAL STANDARD

Summary judgment is appropriate if the pleadings, depositions, and affidavits show that there

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[2] The four questions sought clarification of the previous responses contained in the Certification, and were answered as follows:

> "Further Clarification is required regarding the following questions on the form:
>
> 4. When did the V.A. Medical Center begin treating Mr. Hill for the conditions giving rise to his current incapacity? *11/13/2003*
>
> 4a. What is the probable duration of the patient's present incapacity? *Unknown*
>
> 5b. You state patient can take work intermittently. Please advise if employee can accomplish general office clerical work. *Yes*
>
> Since work can be performed intermittently. Please state the number of hours per week the employee is released to work. *20 hrs*"

is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). An issue of facts is "material" if it is a legal element of the claim under applicable substantive law which might affect the outcome of the case. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986); *Allen v. Tyson Foods*, 121 F.3d 642, 646 (11th Cir. 1997). An issue of fact is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the non-moving party. *Allen*, 121 F.3d at 646. On a motion for summary judgment, the court must view all the evidence and all factual inferences drawn therefrom in the light most favorable to the non-moving party, and determine whether that evidence could reasonably sustain a jury verdict. *Celotex*, 477 U.S. at 322-23; *Allen*, 121 F.3d at 646.

While the burden on the movant is great, the opposing party has a duty to present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Anderson*, 477 U.S. at 252. A mere "scintilla" of evidence in favor of the non-moving party, or evidence that is merely colorable or not significantly probative is not enough. *Id.*; *see also Mayfield v. Patterson Pump Co.*, 101 F.3d 1371, 1376 (11th Cir. 1996) (conclusory allegations and conjecture cannot be the basis for denying summary judgment).

## DISCUSSION

As an initial point, the Court finds that based on the undisputed facts, Hill intended that the VA release all of his medical information which was necessary and appropriate to support his FMLA application with the U.S. Courts. It is the Court's view that this is all that Archer requested of the VA and all that Machin provided to the U.S. Courts.

### A. Hill's Claims are Precluded by CSRA

In support of their Motion, the United States and Archer first contend that the claims against them are precluded by the Civil Service Reform Act ("CSRA"). It is noteworthy that in his reply memorandum Hill completely fails to even mention this point, much less argue that the CSRA does not preclude these claims.

The Court finds that the alleged wrongful actions of the United States and Archer are expressly covered by the CSRA. "[T]he comprehensive statutory scheme established by Congress relating to federal employment (CSRA) precludes the maintenance of job-related Bivens actions by federal employees." *Stephens v. HHS*, 901 F.2d 1571, 1577 (11th Cir. 1990). The CSRA applies equally to federal employees employed by the judiciary. *Lee v. Hughes*, 145 F.3d 1272, 1275 (11th Cir. 1998). The CSRA provides the exclusive remedy for any prohibited personnel practice taken by a government ". . . employee who has authority to take, direct others to take, recommend, or approve, any personnel action. . . ."

5 U.S.C. § 2302. Thus, the CSRA alone covers and provides remedies for prohibited personnel practices against federal employees, such as Hill. A "[p]rohibited personnel practice" is defined by the CSRA:

> (2) [to] solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action . . [or] (8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of – . . . (B) any disclosure to . . another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences – (I) a violation of any law, rule, or regulation, or (ii) . . . an abuse of authority. . . .

5 U.S.C. § 2302(b). Giving Hill the benefit of all inferences, any and all claims asserted against the United States and Archer for Archer's obtaining Hill's medical information from the VA and following up with a request for clarification of that information relate to a personnel action taken in connection with Hill's employment with the U.S. Courts. These alleged claims fall within "prohibited personnel practices" as that term is defined by the CSRA. 5 U.S.C. § 2302(b). Because the CSRA is the exclusive remedy for Hill's claims asserted against the U.S. Courts and Archer, Hill is precluded from asserting

them here. 5 U.S.C. § 2302. *See, e.g., Burl v. Principi*, 181 Fed. Appx. 760 (11th Cir. 2006); *Pinson v. Rumsfeld*, 192 Fed. Appx. 811 (11th Cir. 2006); *Moore v. Potter*, 141 Fed. Appx. 803 (11th Cir. 2005); *Wells v. Federal Aviation Admin.*, 755 F.2d 804 (11th Cir., 1985); *Gleason v. Malcolm*, 718 F.2d 1044 (11th Cir. 1983).

**B. Archer and Machin Have Qualified Immunity**

The constitutional violations which Hill asserts are illegal search and seizure, invasion of privacy, and violation of due process protections. All arise out of Archer's request, pursuant to the Certification, for Hill's medical information in connection with Hill's FMLA application and Machin's responses. Archer and Machin each contend that because she was at all times acting within her discretionary authority as an employee of the U.S. Courts and the VA respectively, Hill has the burden of showing that she violated Hill's clearly established constitutional rights which a reasonable person in her position would have known. The Court agrees. *See Gonzalez v. Reno*, 835 F.3d 1228, 1223 (11th Cir. 2003.)

Archer and Machin then contend that Hill has not, and cannot, carry that burden. Again, the Court agrees. Whether there exists a constitutional violation and whether that violation is clearly established is for a Court to determine as a matter of law. *Harlow v. Fritzgerald*, 457 U.S. 800, 818 (1982). The undisputed evidence shows that neither Archer nor Machin

violated any of Hill's clearly established rights by requesting or providing Hill's medical information. Archer sought that information solely in her attempt to evaluate Hill's FMLA application. The mere act of requesting one's medical information, as opposed to providing that information, does not ordinarily constitute a legal basis for asserting a constitutional violation. Even if a request for medical information could under certain circumstances be a legal basis for such, Archer was not only within her rights to request that information, but had an obligation to do so in order to properly process Hill's application. Archer's request was made pursuant to Hill's authorization as evidence by the Certification. The fact that Archer sought specific, limited clarification of Machin's initial disclosure of Hill's medical condition does not constitute a violation of Hill's rights. Archer's follow-up inquiry was not only reasonable, it was necessary for the proper evaluation of Hill's FMLA application and within the scope of the medical information which was reasonably contemplated by the Certification submitted to the VA.

The Court also finds that in responding to the Certification request submitted by Hill to the VA, Machin did not violate any of Hill's clearly established, constitutional rights. Because Hill authorized the release of his medical information to the U.S. Courts, he had no constitutional right not to have it disclosed to the U.S. Courts. Moreover, even if the Court were to accept Hill's proposition that he had such a right, that right most surely would not, under

the circumstances presented here, be a clearly established right which a reasonable VA physician would have known. Thus, the Court concludes that Hill has failed to show, and under the facts here could never show, that either Archer or Machin violated Hill's clearly established constitutional rights. Accordingly, Archer and Machin are entitled to qualified immunity against the claims Hill alleges here.

## CONCLUSION

For the reasons stated above, the Court concludes that Hill's claims against the United States and Archer are precluded by the CSRA. The Court also concludes that Archer and Machin have qualified immunity against Hill's claims. The Defendants' Motion for Summary Judgment is granted.

DONE AND ORDERED in chambers in Miami, Florida this 10th day of March, 2008.

/s/ Paul C. Huck
PAUL C. HUCK
U.S. DISTRICT COURT JUDGE

cc: All counsel of record
Reginald Hill

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**CASE NO.: 07-80714-CIV-HUCK/SIMONTON**

REGINALD HILL,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA, KATHLEEN ARCHER, and MARILU MACHIN,
Defendants. /

**CLOSED CIVIL CASE**

## FINAL JUDGMENT

Pursuant to the Order Granting Defendants' Motion for Summary Judgment, entered this date, it is hereby ORDERED that Plaintiff takes nothing by this action and that Defendants go hence without day. The Court reserves jurisdiction over appropriate motions for attorney fees and costs. The Clerk of the Court is directed to mark this case CLOSED and DENY all pending motions as moot.

DONE in Chambers, Miami, Florida, this 10th day of March, 2008.

/s/ Paul C. Huck
Paul C. Huck
United States District Judge

Copies furnished to:
Counsel of Record

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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No. 08-11660-AA

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REGINALD HILL,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
KATHLEEN ARCHER,
MARILU MACHIN,
DEPARTMENT OF VETERANS AFFAIRS,
ADMINISTRATIVE OFFICE OF THE COURTS,
General Counsel, et al.,

Defendants-Appellees.

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Appeal from the United States District Court
for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Filed Dec. 19, 2008)

BEFORE: ANDERSON, BARKETT and HULL, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having

requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Rosemary Barkett
UNITED STATES
CIRCUIT JUDGE

United States Court of Appeals
For the Eleventh Circuit

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No. 08-11660

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District Court Docket No.
07-80714-CV-PCH

REGINALD HILL,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
KATHLEEN ARCHER,
MARILU MACHIN,
DEPARTMENT OF VETERANS AFFAIRS,
ADMINISTRATIVE OFFICE THE COURTS,
General Counsel,
CHARLENE SZABO, Medical Center Director,
Department of Veterans Affairs,

Defendants-Appellees.

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Appeal from the United States District Court
for the Southern District of Florida

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JUDGMENT

(Filed Dec. 29, 2008)

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: October 23, 2008
For the Court: Thomas K. Kahn, Clerk
By: Harper, Toni

(2)

No. 09-19

Supreme Court, U.S.
FILED
OCT 30 2009
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

REGINALD HILL,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## PETITION FOR REHEARING

REGINALD HILL, Pro Se
3906 Heat Circle N.
West Palm Beach, Fl 33407
561-687-0609

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## PETITION FOR REHEARING

Petitioner respectfully moves this Court for an order (1) vacating its order of October 5, 2009, which denied the petition for writ of certiorari filed by petitioner on June 26, 2009, and (2) granting the petition for writ of certiorari. The ground for rehearing is stated below.

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## REASON FOR GRANTING REHEARING

**I. The First Amendment protects the rights of patients to have private conversations with their doctors to remain private. The question is whether the prohibition of the requirement notice and consent established a public policy that would affect the present case? The Petitioner's rights to his expectation of privacy in his personal health information as protected under the Due Process Clause of the Fifth Amendment will be violated, causing the further chipping away of the privacy protections of the Fourth Amendment that preserves the public trust as we know it or will this Court, by sustaining the denial of a writ of certiorari, sanction such conduct on the part of the federal employees involved.**

The State of Florida provides a statutory scheme for the release of medical records which require notice and an opportunity to object by the patient in

protection of his or her privacy. The Government violated the law here where the Petitioner enjoyed a reasonable expectation of privacy in his medical information. See Katz v. United States, 442 U.S. 735 (1967) wherein the court held that the Fourth Amendment protects people, not places, therefore, the rights of an individual may not be violated by the government, regardless of whether or not there is a physical intrusion into any given area.

It overturned a 1928 case, Olmstead v. United States, 277 U.S. 438, 478, 48 S. Ct. 564, 572 (1928) and held that wiretaps were unconstitutional searches, because there was a reasonable expectation that the communication would be private. Smith v. Maryland, 442 U.S. 735 (1979). Petitioner reasonably expected his medical information would remain private but for the actions of the government.

Its actions went beyond a 2000-year-old patient-physician confidentiality embodied in the Oath of Hippocrates, a privilege recognized in various forms by the U.S. Supreme Court, Florida Supreme Court, federal and state statutes and regulations. Physicians are not tools to be exploited to divulge private medical information and to be forced to testify with the government who desperately sought protection from the physician, for their flagrant actions, against their own patients. The consequences will be dire for countless patients if the government is allowed access to their medical records to see what a patient is being treated for only to use that information to its benefit without reliance on the facts. The right of privacy

protected by the Constitution gained a foothold in Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), in which the Supreme Court struck down a state statute forbidding married adults from using **Birth Control** because the statute violated the sanctity of the marital bedroom.

Acknowledging that the Constitution does not mention the word *privacy* anywhere in its text, the Court held that a general right to privacy may be inferred from the express language of the First, Third, Fourth, Fifth, and Fourteenth Amendments, as well as from the interests protected by them. Here you have a Human Resource section chief hiding behind the auspices of a U.S. District Court memorandum, who contacted petitioner's physician without notice and written consent. She obtained the petitioner's medical information without a compelling government interest and strong evidentiary showing, that would justify this intrusion, and even then disclosure should only be with the strict safeguards required by Whalen v. Roe, 429 U.S. 589 (1977).

## CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition for writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition for writ of certiorari, and review the judgment below.

Respectfully submitted,

REGINALD HILL
(Pro se Petitioner)

Date: October 30, 2009

## CERTIFICATE OF PETITIONER

As petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

Reginald Hill